
ACCC Communications Market Study

nbn submission to the ACCC in response to the Communications Sector Market Study Draft Report issued in October 2017

[Public]





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1 Introduction

nbn welcomes the opportunity to respond to the ACCC's Draft Report for the Communications Sector Market Study (**Draft Report**).

nbn acknowledges that considerable work has gone into the Market Study and preparation of the Draft Report and commends the ACCC's effort to cover many of the regulatory and competition issues confronting the industry in both the short term and the medium to long term. In this submission, **nbn** comments on the Draft Report, and further supplement **nbn**'s previous submissions.

Two key themes of the Draft Report underlie many of the ACCC's draft findings, proposed actions and recommendations:

- that infrastructure competition at the wholesale level is evolving and is to be welcomed; and
- steps need to be taken in the interim to improve the efficient functioning of wholesale markets.

nbn welcomes the chance to engage with the ACCC on these key themes. Acknowledging the work already done by the ACCC, **nbn** submits that in finalising its report on the Market Study and in undertaking the various activities foreshadowed, the ACCC could further address whether the regulatory regime is in fact appropriate, having regard to the following principles or matters:

- that **nbn** (and all other competitors) should have the ability to compete with other wholesale providers on a level playing field, which is not unnecessarily curbed by regulation. As the ACCC acknowledges in the Draft Report, it is important for **nbn** to have pricing and technology flexibility to meet competition;
- the principle that competition law and access regulation should operate in a technology neutral manner. If regulation should not restrict fixed wireless networks from competing with **nbn**, neither should regulation restrict **nbn** from competing with fixed wireless networks; and
- the communications sector is dynamic. Given this, there is sometimes a fine balance between taking regulatory action to correct market failure, and allowing markets to correct inefficiencies and market failures over time, without regulatory intervention. Often that balance is affected by whether the inefficiency or market failure is structural (and therefore requires regulatory intervention), or behavioural (and therefore more likely to be corrected by the market over time). **nbn** submits that, where the ACCC proposes in its final report to take regulatory action, the ACCC should make explicit whether it expects the market would address the issue in a reasonable timeframe.

Further, as the Draft Report acknowledges, **nbn** is working with the ACCC and the industry on matters concerning pricing and service standards. The ACCC has also announced an inquiry into service standards on the **nbn**TM network. These matters are being progressed in separate fora and accordingly, **nbn** does not propose to address these matters in this context.

Finally, **nbn** notes that recommendation 5 of the Draft Report suggest that the Government should consider whether **nbn** should continue to be obligated to recover its full cost of investment through its prices.¹ Elsewhere

¹ ACCC, Draft Report, page 133.



in the report the ACCC also comments on the appropriateness of the Government's proposed Regional Broadband Scheme (RBS).² **nbn** submits that these matters are policy matters which are appropriately considered and progressed by **nbn** with its Shareholders Departments.

² ACCC, Draft Report, pages 27, 188-189.



2 Appropriate focus on retail level competition

nbn supports the ACCC's continuing focus on the efficiency of retail markets, which will remain important beyond the rollout of the **nbn**TM network and through the continued convergence of fixed line and wireless services, noting that current and future competition in wireless services may well be largely attributable to the four incumbent, vertically integrated service providers.

nbn notes the observation in the Draft Report that:

A significant limitation to the information obtained through the RKR's that we have in place is that it does not provide comprehensive retail market data. We consider that this information is important to our ability to reach findings in the market study and we have therefore used communications market consumer research from Roy Morgan Research to fill this gap.

Presumably the ACCC will look to address this gap in an ongoing manner, for example by expanding the information obtained using RKR's.

nbn notes the ACCC's observations that there is currently limited differentiation on non-price factors such as speed and service quality and performance³ and that:

While service providers and NBN Co may have similar incentives to encourage take-up of NBN services, service providers also have incentives to maximise their profits and appear to be wary of actively promoting higher speed tiers given the additional costs incurred to provision enough capacity to support these services. Service providers may also be wary of trying to up-sell customers to higher priced, higher speed plans at present in case they risk losing the customer...

...We have observed some service providers seek to mitigate this demand usage risk on the NBN by promoting lower speed plans instead of higher speeds... For example, Vocus has publicly expressed concerns that uncertainty around its NBN margins is causing it to actively drive customers towards lower-speed plans, rather than promoting the NBN as an ultrafast broadband network, as there is less risk associated with lower speed plans in terms of consumption growth.⁴

These findings are consistent with **nbn**'s own observations of the retail market.

nbn also welcomes the actions the ACCC is already taking in this space (and which are also discussed in the Draft Report), including its:

- broadband speed claims guidance for RSPs issued in August 2017;
- broadband performance monitoring and reporting program, implementation of which is now well progressed; and
- wider enforcement activities in relation to consumer law issues arising from RSP speed claims.

³ Reference – page58ff.

⁴ ACCC, Draft Report, pages 121-122.



3 Is the current regulatory regime fit for purpose?

3.1 Efficiency of the current regulatory regime

A key finding of the Draft Report is that the communications regulatory and competition arrangements that the ACCC administers are fit for purpose, and are well suited to deal with immediate and longer term issues identified in the market study.⁵ **nbn** assumes that in making this finding, the ACCC may be referring to the adequacy of the regulatory tools that the ACCC has to promote competition in communications markets (such as investigative powers to obtain information, enforcement powers and the ACCC's powers under Part XIC including its powers to declare services and make access determinations) as opposed to the wider regulatory framework as set out in the Competition and Consumer Act (CCA), the Telecommunications Act and the **NBN** Co Companies Act.

The ACCC's final report could, however, usefully acknowledge and address the inefficiencies of the current regulatory regime, and their impact on **nbn**'s ability to compete efficiently in the market. In this regard **nbn** notes that the Draft Report does not in fact specifically address the current regulatory regime in any detail, or comment on its efficiency. While the ACCC has undoubtedly considered the whole regulatory framework when conducting the market study, **nbn** submits that including this analysis is an important part of communicating that the ACCC has undertaken a holistic assessment of communications markets.

For example, the Draft Report discusses the increasing level of infrastructure competition expected from wireless and mobile network operators, and concludes that:

Proposed Recommendation 21: Regulation should not constrain competition with the NBN. Instead, NBN Co will require both greater pricing flexibility and continued technology flexibility to respond to market developments.⁶

nbn agrees that it must have pricing flexibility and continued technology flexibility in order to respond to growing competition from fixed wireless and mobile services. However, it is also necessary to take the next step and ask whether the current regulatory regime allows **nbn** to exercise pricing and technology flexibility, and more broadly, whether the current regulatory regime gives **nbn** the ability to compete efficiently and on a level playing field, which is not unnecessarily curbed by regulation. In doing so, the ACCC's final report could acknowledge that there are aspects of the current regulatory regime which restrict **nbn** from competing efficiently, including the non-discrimination and transparency regulations applying to **nbn**.

This broader consideration is especially important given that the regulatory regime applies to every facet of **nbn**'s business, even in circumstances where **nbn** faces significant competition, as discussed below.

3.2 Infrastructure competition faced by nbn

In its Draft Report, the ACCC expresses a view on the level of competition faced by **nbn**. For example, the Draft Report acknowledges that **nbn** faces a degree of competition from existing network operators, stating:

⁵ ACCC, Draft Report, pages 16, 26, 184-185.

⁶ ACCC, Draft Report, Proposed recommendation 21, pages 24, 179.



...there is now a greater opportunity for competition at the network level, as the dominant fixed line network—the NBN—faces competition not only from other fixed line networks such as non-NBN fibre networks, but also from wireless networks (predominantly mobile networks and to a lesser extent fixed wireless networks).

...

TPG's FTTB network... will likely place sizeable competitive pressure on other next-generation fibre networks, particularly the NBN.

...

*NBN Co also faces some direct competition from non-NBN fibre networks, particularly in rolling out apartment buildings and new housing estates or developments.*⁷

nbn welcomes this acknowledgement from the ACCC, but submits that the ACCC's final report could further recognise and reflect on the regulatory constraints under which **nbn** is currently required to operate in facing this level of infrastructure competition. For example, despite the ACCC's statement regarding the level of competition faced by **nbn**, other parts of the Draft Report refer to **nbn** as a monopoly or 'near monopoly' provider.⁸ Further, the Draft Report acknowledges at several points that the ACCC does not have access to sufficient or reliable information regarding the level of infrastructure competition **nbn** currently faces in the market, or the manner in which infrastructure competition is evolving over the short to medium term. Specifically, the Draft Report states:

*We do not have sufficient information about mobile broadband, non-NBN fixed wireless and non-NBN fixed line broadband services to comment on market shares of relevant service providers.*⁹

...

*We do not have oversight of the speeds being taken up on non-NBN fibre networks, and as such our discussion focuses on broadband services supplied on the NBN.*¹⁰

...

NBN Co also faces some direct competition from non-NBN fibre networks, particularly in rolling out apartment buildings and new housing estates or developments. However, we do not have reliable information about the number of non-NBN fibre services in operation in different geographic locations.

*We also do not have reliable information about the costs of services on non-NBN fibre networks, however, there is potential for these network operators to offer services at a lower price than NBN Co as they do not face the same policy requirements and only deploy networks where it is profitable to do so.*¹¹

nbn encourages the ACCC to gather the information it requires in order to fully assess the extent of this competition, to inform its analysis and findings. This would allow the ACCC's final report and foreshadowed further activities to properly assess and account for the existence of other network operators, and the constraint they impose on **nbn**. This includes the significant level of competition which exists in the supply of superfast broadband services to businesses customers, addressed below.

⁷ ACCC, Draft Report, page 76.

⁸ ACCC, Draft Report, pages 73, 129-130.

⁹ ACCC, Draft Report, page 51.

¹⁰ ACCC, Draft Report, page 65.

¹¹ ACCC, Draft Report, page 76.



3.3 Infrastructure competition in business services

The Draft Report indicates that in conducting the market study, the ACCC has focused on the supply of services to residential end users and small businesses that purchase 'off-the-shelf' communications services, and not on the supply of customised communications services to larger enterprises.

nbn submits that consideration of the business segment of the market and the efficiency of the regulatory regime applying to the supply of business services in respect of that segment should be a key area of further work for the ACCC. Doing so would be consistent with the approach of making a holistic assessment of communications markets, particularly given that all major competitors operate across all customer segments.

There is significant infrastructure competition in the supply of superfast broadband to business customers. Such competition arises from the dominant incumbent provider, Telstra, through its continued use and rollout of its point-to-point fibre network, and well as from other service providers including Optus, Vocus and TPG. Each of these service providers:

- have extensive access networks, largely used for supplying services to business customers;
- are vertically integrated, including further up the communications supply chain through ownership of extensive backhaul networks and network infrastructure; and
- are well established players, having long been incumbents in the market or having consolidated their position through more recent mergers and acquisitions.

Further, two of the four largest service providers – Telstra and Optus – are horizontally integrated into mobile services (each owning national mobile networks), while TPG has announced in April this year that it will build its own national mobile network. Vodafone is also active in the Australian business market leveraging their extensive 4G mobile network to service businesses (particularly small business)¹². These factors ensure that the largest service providers are intensely competitive in the supply of services to business customers.

Annexure A sets out further information on the level of infrastructure competition faced by **nbn** in the business segment.

In comparison, **nbn** is effectively a new entrant in the supply of services to business customers. As the rollout of the **nbn**TM network continues to move into metro areas, and in line with **nbn**'s Statement of Expectations, **nbn** is required to provide services to business customers and compete in the business segment.

nbn's entry into the business segment will promote competition and enhance efficiency at both the network and retail level including by allowing new downstream entrants to compete for business customers. For example, the recent launch of Vodafone **nbn** will likely enhance competition, particularly in the small business segment, by enabling Vodafone to offer a converged broadband experience¹³. It also gives **nbn** greater scope to improve the scale and scope of its network infrastructure, and improves **nbn**'s ability to price flexibly and compete in communications markets more generally.

¹² <https://www.vodafone.com.au/media/vodafone-named-australias-1-telco-for-small-business>.

¹³ See <https://www.vodafone.com.au/media/vodafone-nbn-launches>.



The existence of considerable competition in the supply of services to business customers was accounted for during the formation of the current regulatory regime. In particular, the current level playing field arrangements were framed so as to not apply to services supplied to medium and large corporate and government customers. The policy rationale underpinning this approach was (among other things) that services supplied to those customers were subject to competition. For this reason, **nbn** has not sought to reach agreements with the operators of legacy business networks to migrate business customers to the **nbn**. Rather, **nbn** will compete in that segment as a new entrant, in competition with established network operators, all of which are permitted to operate on a vertically integrated basis.

Further, the Government now proposes to amend the level playing field provisions in the Telecommunications Act so that they no longer apply to services supplied to small business customers, indicating that the Government expects the supply of services to small business customers to also be competitive. It appears that the ACCC has not yet, in assessing the current regulatory framework, taken account of the level of infrastructure competition that **nbn** faces in the business segment.



3.4 A level playing field

nbn submits that in assessing the efficacy of the regulatory regime and **nbn**'s ability to compete efficiently, the ACCC's final report should acknowledge that the current regulatory regime does not in fact provide a level playing field.

The current regulatory regime requires *all* eligible services provided by **nbn** to be declared and be subject to non-discrimination and transparency requirements. This is the case even in customer segments or geographic areas where **nbn** faces competition. In contrast, other service providers are only subject to regulation depending on the technology used in their networks, or the type of customers they supply.

For example:

- all eligible services provided by **nbn** over fixed wireless networks are regulated, while the fixed wireless services of other providers are unregulated. The ACCC's final report could seek to reconcile its recommendation that fixed wireless services should remain unregulated with the fact that **nbn**'s fixed wireless services (both those which **nbn** supplies in regional and rural areas as well as those which **nbn** may supply in metropolitan areas in the future) are regulated, and state the ACCC's view of the impact of this asymmetric regulation on efficient infrastructure competition. Ensuring a level playing field for fixed wireless infrastructure would rationalise incentives of **nbn** and other service providers to invest, and reduce the prospect of the inefficient duplication of natural monopoly infrastructure; and
- all eligible services provided by **nbn** to business customers are regulated, while the same services supplied by other providers to those customers are not regulated.¹⁴ This is the case despite the significant level of competition which exists in the supply of services to these customers. As a result, **nbn** is placed at a significant commercial disadvantage in competing for business customers, which not only adversely impacts **nbn** but all RSPs that would use **nbn**'s wholesale services in order to serve business customers. These issues are addressed further in Section 4.4.

3.5 Non-discrimination obligations

The Draft Report does not refer to **nbn**'s non-discrimination obligations. **nbn** submits that the ACCC's final report could acknowledge these provisions and the impact they have on **nbn**'s ability to operate and compete efficiently.

nbn's non-discrimination obligations formed part of legislative reforms designed to enshrine **nbn**'s mandate as a wholesale-only, open access provider. The regime regulates the terms on which **nbn** supplies eligible services but also a broad range of other activities, including any activities which are ancillary or incidental to the supply of eligible services, as well as the provision of information by **nbn**. The obligations were imposed at **nbn**'s inception, at a time when the focus was on **nbn**'s role in the residential market, and the level of competition it would face was unclear. The rationale of the obligations was to prevent **nbn** from favouring larger access seekers to the detriment of competition.

¹⁴ Proposed legislative reforms will remove small business from the level playing field arrangements.



The original form of those obligations as first introduced to Parliament was less restrictive, allowing for limited variation in **nbn**'s service offering, including where discrimination aids efficiency, was authorised by the ACCC, or related to a pilot or trial.

However, the non-discrimination obligations as ultimately enacted did not contain these exceptions, and as a consequence, those obligations have led to a range of operational difficulties for **nbn**, and have restricted **nbn**'s ability to provide services in an efficient and commercially rational manner. This has been acknowledged by:

- the Vertigan Panel, which recommended significant changes to those obligations including the introduction of an exception where discrimination between access seekers aids efficiency;¹⁵ and
- the Federal Government, which sought to implement some of the changes recommended by the Vertigan Panel – including an exception to the non-discrimination obligations for conducting pilots or trials of new eligible services or enhanced declared services, to promote innovation.¹⁶

Further, the ACCC has previously acknowledged this to a degree, noting in its submissions to the Vertigan Panel that:

- the non-discrimination provisions may limit **nbn**'s ability to take advantage of efficiencies, such as by offering different price terms to access seekers who are prepared to make investments that reduce the costs to **nbn** of providing access; and
- should the non-discrimination provisions be retained, the ACCC recommends that they are a transitional measure which is subject to review at an appropriate point.¹⁷

However, the changes recommended by the Vertigan Panel and proposed by the Government have not been made to date, such that the non-discrimination obligations restrict **nbn**'s ability to operate efficiently and to promote competition in downstream markets. This is the case at a time where there is now an even stronger rationale for revisiting those obligations, given the level of competition faced by **nbn** – particularly from existing network operators in metro areas and in the supply of business and government services, and given the increasing potential of competition from 5G fixed wireless and mobile services.

As an example of the needlessly broad scope of the non-discrimination obligations, **nbn** refers to the operation of its Marketing Development Fund (**MDF**), through which **nbn** promotes the take-up of **nbn**-based services by contributing to the marketing of those services by RSPs. In order to satisfy the non-discrimination obligations, **nbn** provides all RSPs with an equal opportunity to participate in the MDF. This has the following consequences:

- large incumbent RSPs, which are well-funded organisations and have large marketing budgets, have the same opportunity to receive marketing funding from **nbn** as smaller RSPs and new entrants; and
- **nbn** has less scope to subsidise the pro-competitive marketing activities of new entrants and smaller innovative RSPs.

¹⁵ Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw, *Independent cost-benefit analysis of broadband and review of regulation: Statutory review under section 152EOA of the Competition and Consumer Act 2010*, June 2014, pages 46-51.

¹⁶ See the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2016 and related Explanatory Materials.

¹⁷ ACCC, *Submission to the Independent Cost Benefit Analysis Review of Regulation Telecommunications Regulatory Arrangements Paper (s.152EOA Review)*, April 2014, pages 25-26.



This example demonstrates the inefficiency of the 'one-size-fits-all' approach required by the non-discrimination obligations. Arguably, these consequences favour existing and established RSPs and work to maintain the prevailing market structure. This is contrary to the intended operation of non-discrimination obligations.

3.6 nbn's transparency framework requirements

Under Part XIC of the CCA, all eligible services supplied by **nbn** must be declared, which may be via the publication of a Standard Form of Access Agreement (**SFAA**) on **nbn**'s website, or via the Special Access Undertaking (**SAU**) approved by the ACCC.

Further, to facilitate the ACCC's oversight of **nbn**'s non-discrimination obligations, Part XIC of the CCA establishes a regulatory transparency regime, under which **nbn** must provide a 'Statement of Differences' to the ACCC every time **nbn** enters an access agreement which differs from the relevant SFAA on **nbn**'s website. The regime provides for the ACCC to publish these Statements of Differences.

In addition, **nbn** is required by its current framework to regularly publish and make available to its potential and existing customers (which, in many cases, are also **nbn**'s competitors) commercially sensitive information concerning matters such as network rollout plans, proposed product offerings and proposed pricing changes. The framework requires **nbn** to operate in a manner that no other commercial organisation facing competition would operate. In particular:

- it is difficult for **nbn** to proceed in an agile manner when developing new services and responding to competition; and
- requirements to publish SFAAs in respect of all services regardless of the level of competition faced, together with extensive consultation requirements result in **nbn**'s competitors having access to **nbn**'s commercially sensitive information which enables those competitors to undercut **nbn**.

nbn submits that in a market which is characterised by rigorous competition, the provision of such sensitive pricing and supply information would not occur. The ACCC's final report should acknowledge and consider these impacts.

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4 Wholesale aggregation services

4.1 Proposed Record Keeping Rule

As noted by the ACCC, wholesale aggregation services currently support a small number of all **nbn** based retail broadband services. This is despite some evidence of strong demand for these services from smaller RSPs. Accordingly the emergence of a vibrant wholesale aggregation market would provide potential for greater competition and consumer benefit in downstream retail markets.

Australia's retail broadband market is currently dominated by a small number of large providers, each of which is vertically and horizontally integrated. Important structural characteristics of the market are:

- on the **nbn**TM network, Telstra, TPG, Optus and Vocus currently account for approximately 94% of the market.¹⁸ Via acquisitions and other brand strategies, these providers now have an extensive network of retail brands and subsidiaries;¹⁹
- in addition to being the four largest retail service providers, Telstra, TPG, Optus and Vocus are also important suppliers of wholesale aggregation services. Smaller providers therefore depend on their biggest competitors for access to key inputs;
- Telstra, TPG, Optus and Vocus own and operate extensive transmission networks. Smaller providers are, on many routes, dependent on these providers in order to obtain access to backhaul from **nbn**'s POIs. TPG and Vocus are also two of the largest providers of access to dark fibre;²⁰ and
- Telstra, TPG, Optus and Vocus own and operate their own access networks and therefore have the ability to by-pass the **nbn**TM network in a number of local access areas. These four providers are also likely to invest in fixed wireless networks, particularly with the advent of 5G, increasing further their ability to bypass the **nbn**TM network.

To the extent that these structural characteristics of the market are limiting competition, facilitating the ability of smaller RSPs to grow and provide competitive constraint in the provision of downstream services on the large service providers would promote competition in downstream markets and therefore the long term interests of end users.

nbn agrees that there may be a need for the ACCC to obtain information from the suppliers of wholesale aggregation services via a record keeping rule to monitor the supply of wholesale aggregation services to determine whether regulatory intervention is needed. The ACCC should:

- move quickly to obtain the information it needs in order to form a view on whether regulatory intervention is required; and
- take a holistic view in relation to all the regulatory tools available to it. In addition to considering the position under Part IV or Part XIB of the CCA, the ACCC should also consider how regulation of

¹⁸ ACCC, Draft Report, page 50.

¹⁹ A non-exhaustive list of the retail brands and subsidiaries.

²⁰ Table 4.11 of the Draft Report (pages 91-91) contains a summary of the wholesale providers of transmission and fibre services. **nbn** considers that this table is accurate, based on the information currently available to **nbn**.



wholesale aggregation services and backhaul markets under Part XIC would address any market failures.

4.2 Recommendation that nbn provide transitional services

In its Draft Report the ACCC recommends that:

*in the absence of a genuinely competitive wholesale aggregation market NBN Co should consider provision of transitional products or pricing measures, for no longer than the NBN build period that facilitate the entry of smaller or niche service providers to provide a further competitive dynamic.*²¹

nbn wishes to make the following brief points in relation to this recommendation:

- It is a commercial and operational consideration for **nbn** to consider what steps (if any) it chooses to take in response to any market failure in the supply of wholesale aggregation services. **nbn** is currently developing its NNI Link product which addresses a number of RSPs concerns about the absence of a competitive wholesale aggregation product. The NNI Link product provides for a variation of the wholesale aggregator model, offering more options for wholesaling a service over **nbn**, and therefore more options for the purchase of resold services by RSPs. It is a virtual NNI so that an RSP who doesn't have a physical connection to the POI can still connect to that POI via a wholesale aggregator, but buy their CVC and AVC directly from **nbn**.

The idea is to enable multiple RSPs to be able to share physical NNI ports, so that, for example, Vocus could buy a large NNI, and then allow Vodafone to place their CVCs on that NNI without having to get their own NNI in the POI. This is meant to make it much easier for our aggregators to wholesale **nbn** interconnection services, thereby helping to solve the 121 POI issue. There are a number of advantages in this concept:

- the RSP can control their own CVC contention;
 - the RSP deals directly with **nbn** via our B2B portal for installation and service assurance (rather than double-handling by the wholesaler);
 - the large wholesalers still retain the benefit of NNI income;
 - there are fewer physical connections at the POI; and
 - it opens potential opportunities for backhaul operators who don't want to offer AVC or CVC but wish to become resellers of NNI/backhaul.
- To the extent that the ACCC has identified that the markets for wholesale aggregation services and/or backhaul are not functioning efficiently or competitively it is appropriate for the ACCC to use its powers to address the issue, rather than proposing that a regulated entity should seek to enter an adjacent market on a temporary basis without any consideration of the commercial viability for the entity of doing so.

²¹ ACCC, Draft Report, Proposed recommendation 8, pages 22, 144.



5 Accuracy of rollout information

One of the findings contained in the Draft Report is that, despite improvements to **nbn** rollout information for service providers, this information continues to be inaccurate and does not appear to be readily available to all service providers.²² The Draft Report goes on to conclude that this may have important commercial consequences and may limit the ability of service providers to actively compete for customers during the migration period to the **nbn**TM network.

nbn does not agree with this draft finding which appears to rely on anecdotal information. Network rollout information is widely available as follows:

- all access seekers which have entered into a WBA with **nbn** have access to network rollout information;
- some RSPs have entered into a WBA with **nbn** even though they are currently acquiring all their **nbn**-based services from a wholesale provider of **nbn**-based services. Those RSPs still receive network information from **nbn** even though they are acquiring services from a third party;
- **nbn** also enters into Information Agreements with other RSPs and third parties, through which those parties receive the same type of network rollout information which is available to access seekers which have entered into a WBA with **nbn**. There are two types of Information Agreements:
 - Downstream Customers Information Agreement - which **nbn** enters into with RSPs which do not directly connect to the **nbn**TM network via a WBA but sells **nbn**-based services via a wholesale aggregator; and
 - Prospective Customer Information Agreements - which **nbn** enters into with people who are considering offering **nbn**-based services at the retail level. The Draft Report relevantly provides that, notwithstanding the ability of these third parties to enter into Information Agreements with **nbn**, concerns around information being less readily available to these third parties compared with access seekers, still 'appear to persist'. **nbn** is not aware of these concerns. To the extent the ACCC proposes to make a finding in respect of this issue, **nbn** submits that the ACCC should be more specific as to what the concerns are (such as the types of information available to access seekers which are not available to these third parties) and how that asymmetry in information is impacting these service providers.
- **nbn** also deals with other third parties, such as local councils, which require network rollout information for planning purposes. **nbn**'s local and State Government business unit deals with those requests;
- **nbn** makes network rollout serviceability and migration information available through its Public Information on Migration (**PIM**) campaign to a range of interested stakeholders including the public;
- **nbn** continues to provide end users with, as far as practical, accurate and timely network roll-out and serviceability information in accordance with the Migration Assurance Policy Framework (**MAF**), published by the Federal Government in February 2016.²³

²² Page 79 of the Draft Report.

²³ See: <https://www.communications.gov.au/publications/migration-assurance-policy-statement-framework>.



The Draft Report relevantly provides that, notwithstanding **nbn**'s provision of network rollout information to third parties in the manners described above, including through Information Agreements, concerns around information being less readily available to these third parties compared with access seekers still 'appear to persist'.²⁴ **nbn** is not aware of these concerns. To the extent that the ACCC proposes to make a finding in respect of this issue in its final report, **nbn** submits that the ACCC should be more specific as to what the concerns are (such as by stating the types of information available to access seekers which are not available to third parties) and how that asymmetry in information is impacting these service providers.

It is unclear whether the ACCC has examined the conduct of wholesale aggregators and why they are not providing information to their RSP customers.

²⁴ ACCC, Draft Report, page 79.



6 The future of the regulatory regime

6.1 Competition from fixed wireless and mobile services

The Draft Report highlights the potential for competition from fixed wireless and mobile services to act as an external constraining factor on **nbn**. However, it goes on to find that the full extent of future competition between fixed line networks and wireless networks is not known, and may not be apparent for several years.²⁵ The ACCC then concludes that regulation should not impede fixed wireless or mobile services from competing with **nbn**.²⁶

nbn submits that the ACCC's final report should note and account for recent developments in the provision of network infrastructure, and developments that are expected to occur between now and the commercial rollout of 5G services in 2020, including the infrastructure competition expected from 4.9G wireless services. For example, it is worth accounting for:

- the entry of Horizon Wireless, a Sydney-based distributor of the technology of US telecommunications firm Tarana Wireless. Horizon Wireless has recently partnered with the NSW electricity transmission company TransGrid to build wireless networks in the NSW regional centres of Muswellbrook and Wagga Wagga, with expected speeds of up to 1.3Gbps for business and residential customers in 2018;²⁷
- Superloop's recent acquisition of NuSkope and its decision to expand its fixed wireless coverage in Adelaide;²⁸
- the entry of Melbourne based carrier 5G Networks, which was recently listed on the ASX, and which plans to build its own wireless infrastructure to midmarket corporates in outer metropolitan business parks and industrial areas;²⁹ and
- TPG's plans to build its own national mobile network – and its expectation of the convergence of mobile and fixed line services.³⁰

In addition to these Australian developments, Verizon's has recently accelerated plans to move beyond 5G trials to a commercial launch of 5G wireless networks, covering three to five cities in the USA before the end of 2018, with a wider rollout in 2019.³¹

²⁵ ACCC, Draft Report, page 132.

²⁶ ACCC, Draft Report, Proposed recommendation 21, pages 24, 179.

²⁷ See: <https://www.crn.com.au/news/sydney-based-telco-to-build-wireless-network-in-regional-nsw-to-rival-nbn-477104>; and <http://www.theaustralian.com.au/life/personal-technology/beaming-in-broadband-alternatives/news-story/3993ac30373b012816c5eaa1a281515d>.

²⁸ See: <https://superloop.com/superloop-announces-the-acquisition-agreement-of-nuskope/>; and <https://www.itnews.com.au/news/superloop-grows-fixed-wireless-footprint-with-nuskope-buy-473001>.

²⁹ See: <https://www.5gnetworks.com.au/asx-announcements/>.

³⁰ See: Communications Day, *TPG expands on mobile plans, scores Adelaide CBD fibre contract*, 7 December 2017; and <https://www.itnews.com.au/news/tpg-expands-initial-4g-clusters-to-adelaide-brisbane-479261>.

³¹ See: Communications Day, *Verizon plans to launch 5G as fixed substitute, targeting 30m households*, 1 December 2017; and <http://www.zdnet.com/article/verizon-5g-to-launch-in-sacramento-in-2018/>.



6.2 Technology neutral regulation

In concluding that regulation should not impede fixed wireless or mobile services from competing with **nbn**, the ACCC's Draft Report appears to make a case for technology neutral regulation – by recommending that fixed wireless networks continue to develop and evolve unconstrained by regulation, while maintaining existing regulation of fixed line networks. As noted previously, the ACCC's Draft Report also states more generally that the current regulatory and competition arrangements are fit for purpose - now and in the long term.

nbn submits that the ACCC's final report should consider further the impact of maintaining the asymmetric nature of the current regulatory regime, in circumstances where there is 'substantial convergence' of fixed line and wireless services,³² and this convergence is only expected to increase with the commercial rollout of 5G services in two to three years' time. Even though it is true that the full extent of future competition between fixed line and wireless networks cannot yet be known, **nbn** submits that this does not mean that it is safe to conclude that current issues caused by an absence of technology neutral regulation should not be addressed, or to conclude that the current regulatory regime is appropriate and fit for purpose.

This issue is also important given that a range of network investment decisions are being made now or in the near future, including in relation to the rollout of 4.9G networks, as well as 5G networks. The fact that the regulatory regime is not technology neutral may distort those investment decisions, potentially leading to economically inefficient investment in and use of network infrastructure. Such inefficient or distorted investment, and its implications for competition, cannot be reversed through future regulatory decisions.

In preparing its final report, the ACCC should:

- further assess and form a more developed view as to the extent and intensity of competition that **nbn** and other fixed networks will face from wireless networks including 5G networks; and
- confirm the circumstances in which it would support technology neutral regulation.

³² ACCC, Draft Report, pages 76-77.



Annexure A – infrastructure competition in business services

[Starts Commercial-in-Confidence]

[Ends Commercial-in-Confidence]